

No. 1-12-2232

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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**IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT**

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DISCOVER BANK,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 10 MI 100430
	)	
GREGORY KULIK,	)	The Honorable
	)	Lorna Propes,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE HARRIS delivered the judgment of the court.  
Justices Simon and Pierce concurred in the judgment.

**ORDER**

*Held:* Defendant's claim of newly discovered evidence brought under section 2-1401 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)) is barred by *res judicata* because the materials he used in support of his claim were available at the time summary judgment was entered against him.

¶ 1 Plaintiff, Discover Bank, filed a complaint against defendant, Gregory Kulik, seeking to collect a credit card debt of \$9,357.59. The circuit court entered summary judgment in Discover

Bank's favor on June 22, 2010, and Kulik appealed. This court affirmed the judgment of the circuit court. *Discover Bank v. Kulik*, 2011 IL App (1st) 102574-U. Relevant to this appeal, Kulik argued the affidavit of Discover Bank's servicing agent, which it attached to its motion for summary judgment, failed to comply with Illinois Supreme Court Rule 191. Ill. S. Ct. R. 191 (eff. Jan. 4, 2013). *Id.* This court held that Kulik waived his objection to the affidavit for failing to timely object to it. *Id.*

¶ 2 On June 21, 2012, Kulik, *pro se*, filed a petition to vacate the summary judgment entered against him on June 22, 2010, pursuant to section 2-1401 of the Illinois Code of Civil Procedure (Code). 735 ILCS 5/2-1401 (West 2012). In his petition, Kulik again challenged the affidavit of Discover Bank's servicing agent, claiming he has newly discovered evidence which, if it had been known at the time of the original proceedings, would have prevented the entry of summary judgment against him. The circuit court denied Kulik's petition, and his subsequent motion to reconsider. Before this court, Kulik, again appearing *pro se*, argues that the circuit court improperly denied his section 2-1401 petition. We hold Kulik's claim is barred by *res judicata*.

¶ 3 JURISDICTION

¶ 4 On June 21, 2012, Kulik filed his petition to vacate the summary judgment entered against him pursuant to section 2-1401 of the Code. 735 ILCS 5/2-1401 (West 2012). On July 3, 2012, the circuit court denied Kulik's petition. Kulik filed a motion to reconsider on July 9, 2012, which the circuit court denied on July 19, 2012. Kulik timely filed his notice of appeal on July 30, 2012. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rule 304(b)(3), governing appeals from judgments or orders granting or denying relief as requested in

a section 2-1401 petition. Ill. S. Ct. R. 304(b)(3) (eff. Feb. 26, 2010); see also *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 102 (2002) ("a circuit court's ruling on [a section 2-1401 petition] is deemed a final order and provision has been made for immediate review of these orders in Supreme Court Rule 304(b)(3)").

¶ 5

## BACKGROUND

¶ 6

### Summary Judgment and Initial Appeal

¶ 7

The following facts are deduced, in relevant part, from this court's order addressing Kulik's first appeal. *Discover Bank v. Kulik*, 2011 IL App (1st) 102574-U. A more detailed recitation of the facts can be found in that order and need not be repeated here. On February 25, 2010, Discover Bank filed its complaint against Kulik alleging it had issued Kulik a credit card, that Kulik incurred charges by use of that credit card, and Kulik defaulted by failing to make the required payments on the credit card. Discover Bank subsequently filed a motion for summary judgment, and attached, amongst other exhibits not relevant to the present appeal, an affidavit from James Ball, a servicing agent of Discover Bank. Ball attested that Kulik owed \$9,357.59 on the credit card, that he reviewed the account, and that the documents in question were made in the normal course of business, and are reliable. The circuit court granted Discover Bank's motion for summary judgment on June 22, 2010, and entered judgment against Kulik in the amount of \$9,709.57, plus costs. On July, 20, 2010, Kulik filed a motion to reconsider, asking the circuit court to vacate its entry of summary judgment. In his motion, Kulik asserted for the first time that the affidavit of James Ball was insufficient as it did not show how the affiant arrived at the amount owed of \$9,709.57. On July 29, 2010, the circuit court denied Kulik's

motion to reconsider.

¶ 8 Kulik appealed, and raised numerous issues attacking both Discover Bank's complaint and the entry of summary judgment against him. Relevant to this appeal, Kulik argued James Ball's affidavit failed to comply with Illinois Supreme Court Rule 191. Ill. S. Ct. R. 191 (eff. Jan. 4, 2013). This court held that Kulik waived his objection to the affidavit for failing to timely object to it. Specifically, Kulik never filed a motion to strike the affidavit and did not make any objection to the affidavit until his motion to reconsider, which he filed almost a month after the circuit court entered judgment against him.

¶ 9 Section 2-1401 Petition and Present Appeal

¶ 10 On June 21, 2012, Kulik filed a petition to vacate the judgment entered against him pursuant to section 2-1401 of the Code. 735 ILCS 5/2-1401 (West 2012). Kulik alleged in his petition the following: the petition was timely; his claim was meritorious; he acted diligently in bringing the claim; and newly discovered evidence would have, if known at the time of the original action, prevented the entry of summary judgment. As support for his alleged meritorious claim, Kulik stated he researched similar claims filed by Discover Bank and its affiliate, DFS Services, LLC, in other civil actions "from various counties." According to Kulik, Discover Bank and its affiliates defrauded the public by filing "robo-signed" affidavits as both the affiant and as a notaries. Kulik defined robo-signing as when:

"an individual signs documents without reviewing them. Rather than actually reviewing the individual details of each case, robo-signers assume the paperwork to be correct and sign it

automatically, like robots."

In addition to robo-signing, Kulik alleged that Discover Bank or its affiliates also altered signatures on its affidavits.

¶ 11 Concerning his own case, Kulik alleged that the affidavit of James Ball that Discover Bank attached to its motion for summary judgment was not made with Ball's personal knowledge of the facts of Kulik's case. Rather, Ball robo-signed the affidavit. Specifically, Kulik alleged:

"the affidavit and signature of affiant James Ball attached to Plaintiff's motion for summary judgment \*\*\* asserts personal knowledge but in reality this affidavit had been robo-signed and that this individual actuality [*sic*] knew nothing about the account pertaining to the credit card lawsuit. In addition, James Ball is an Ohio notary public whose notary public signature appears on tens of thousands of affidavits across the United States, and whose signature in these cases varies significantly. Further James Ball['s] signature on this affidavit is dissimilar from the signature on the Ohio notary public application."

¶ 12 As support for his allegations, Kulik attached two affidavits: his own affidavit, in which he attests that the statements he made in his petition are true and correct; and the affidavit of Warren Spencer. Spencer, according to his affidavit, is a "Forensic Document Examiner" and a "Certified Fraud Examiner." Spencer attested that he compared James Ball's signature on his February 12, 2009, application to be a notary public in the state of Ohio with Ball's signature on

36 other documents. All of the documents with Ball's signature were provided to Spencer "for the purpose of determining whether the possibility of fraudulent signatures exists." Spencer found that in 8 of those documents Ball's signature was similar to Ball's signature on his notary public application; while 11 were "inconclusive;" and 8 were "dissimilar." Relevant to this appeal, Spencer found that James Ball's affidavit Discover Bank had attached to its motion for summary judgment in this case, dated March 16, 2010, was "dissimilar" to Ball's February 12, 2009, application to be a notary public in Ohio.<sup>1</sup>

¶ 13 On July 3, 2012, circuit court judge Lorna E. Propes, denied Kulik's petition to vacate. The record does not contain a certified bystander's report for the proceedings that occurred on July 3, 2012.<sup>2</sup>

¶ 14 On July 9, 2012, Kulik filed a motion to reconsider the denial of his petition to vacate. In his motion to reconsider, Kulik alleged the circuit court found it did not have jurisdiction over the matter. His motion to reconsider only argued jurisdiction. On July 19, 2012, circuit court judge Sheryl A. Pethers denied Kulik's motion to reconsider.

¶ 15 On July 30, 2012, Kulik filed his notice of appeal. After Kulik filed his notice of appeal,

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<sup>1</sup> We note that although Kulik alleges the March 16, 2010, affidavit is the same affidavit Discover Bank attached to its motion for summary judgment, the affidavit does not contain a case number or a file stamp from the circuit court of Cook County. Discover Bank's motion for summary judgment filed in the original proceedings is not part of the record in this case.

<sup>2</sup> It appears from the record that the parties each submitted their own versions of what happened on July 3, 2012, to Judge Propes for certification. Written on each document is the statement "I have no recollection of these events, Lorna Propes, Judge." As discussed *infra*, this is not a certified bystanders report according to Illinois Supreme Court Rule 323(c), and will not be considered as such. Ill. S. Ct. R. 323(c) (eff. Dec. 13, 2010).

Judge Sheryl A. Pethers issued a settled and certified bystanders report for the hearing addressing defendant's motion to reconsider. Judge Pethers' bystander's report provided, in relevant part, that neither party requested a briefing schedule on the motion. Judge Pethers noted the matter did not need to be transferred to Judge Propes, who had denied defendant's petition to vacate. Judge Pethers explained that Judge Propes had been sitting in Judge Pethers' stead when she denied Kulik's petition to vacate. Regarding the hearing on Kulik's motion to reconsider, Judge Pethers stated the parties argued as follows:

"At the hearing, \*\*\* Kulik argued that 2-1401 petitions were new cause of actions and that the judgment should be vacated. [Discover Bank's] counsel countered that the petition was improper because summary judgment had been entered against [Kulik] after he agreed that he used the credit card at issue and had defaulted on payments."

Judge Pethers stated in the bystander's report that she considered the written motion and the parties' arguments in making her decision. She further noted that "[o]bviously, I cannot address what transpired at the July 3, 2012 hearing before Judge Propes on the Petition to Vacate."

¶ 16

#### ANALYSIS

¶ 17 Due to the state of the record and Kulik's brief before this court, we must first address what is properly before us. There appear to be many inconsistencies in the record, many of the pleadings appear to be out of order, and pleadings or orders may be missing from the record. The rules addressing appellate procedure and procedural default are well established. The burden of presenting a sufficiently complete record falls on the appellant, Kulik in this matter, and any

doubts as to the record will be resolved against him. *In re Marriage of Gulla*, 234 Ill. 2d 414, 422 (2009). Without a complete record, we must presume that the relevant order of the circuit court had a sufficient factual basis and conformed with the law. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). "Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Id.* at 392. Issues raised for the first time on appeal and not first presented to the circuit court will not be considered. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996); *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 229 (1986). Furthermore, we also cannot consider matters outside of the record. *In re Marriage of Gulla*, 234 Ill. 2d at 422.

¶ 18 In this matter, Kulik violated these principles. For the two hearings relevant in this case, the hearing on Kulik's section 2-1401 petition and his subsequent motion to reconsider; the record only contains one certified bystander's report. The record contains a certified bystander's report from Judge Pethers, who heard the motion to reconsider; but does not contain a certified bystander's report from Judge Propes, who heard the section 1-1401 petition. It appears from the record that the parties each submitted their own versions of what happened on July 3, 2012, hearing on the section 2-1401 petition to Judge Propes for certification. Written on each document is the statement "I have no recollection of these events, Lorna Propes, Judge." We cannot say, however, that this is a certified bystanders report according to Illinois Supreme Court Rule 323(c) as it is not certified or filed. Ill. S. Ct. R. 323(c) (eff. Dec. 13, 2010) ("The court, holding hearings if necessary, shall promptly settle, certify, and order filed an accurate report of proceedings."). We make no opinion on whether Judge Propes actually signed these documents, or whether she could or could not recall what happened that day, but we do hold that they do not



qualify as a bystander's report according to Rule 323(c). *Id.* As such, we don't know what arguments were presented to the circuit court regarding Kulik's section 2-1401 petition besides what is actually in Kulik's petition found in the record. Any doubts arising from the incompleteness of the record in this case will be resolved against Kulik, the appellant. *Foutch*, 99 Ill. 2d at 392.

¶ 19 We will also not consider matters outside the record. *In re Marriage of Gulla*, 234 Ill. 2d at 422. For example, Kulik devotes a portion of his brief to arguing the circuit court denied his 2-1401 petition because the court believed that it did not have jurisdiction. Without a certified bystander's report, we do not know why the circuit court denied his petition. The order does not specify why the circuit court denied the petition. Therefore, we will not consider Kulik's arguments and statements regarding jurisdiction because they do not appear in the record. Similarly, Kulik provides quotes, verbatim, allegedly made by both of the circuit court judges that he appeared before on this matter. He also discusses phone conversations that he allegedly had with the staff members at the circuit court. This information is also not in the record, and we will not consider it. *Id.*

¶ 20 Kulik also argues in his brief that the certified bystander's report, prepared by Judge Pethers, is inaccurate. Absent from the record, however, is any objection made by him to Judge Pethers regarding her report. Issues raised for the first time on appeal and not first presented to the circuit court will not be considered. *Haudrich*, 169 Ill. 2d at 536. There appears in the record a motion filed by Kulik seeking to strike Discover Bank's proposed bystander's report. Absent from the record, however, is any objection to Judge Pether's certified bystander's report.

Therefore, we will also not consider Kulik's arguments regarding the bystander's report.

¶ 21 Accordingly, the only issue properly before this court is Kulik's argument that his section 2-1401 petition raised a timely, meritorious claim based on newly discovered evidence. In response, Discover Bank points out that this court may affirm the circuit court's decision on any basis that appears in the record. Accordingly, Discover Bank argues the record shows Kulik's petition was properly denied because it is barred by *res judicata*. Alternatively, Discover Bank argues Kulik waived any argument concerning James Ball's affidavit, and that Kulik failed to show due diligence or present a meritorious claim under section 2-1401 of the Code. Kulik did not file a reply brief in this matter.

¶ 22 We agree with Discover Bank that we may affirm the circuit court on any basis that appears in the record. *Trustees of Wheaton College v. Peters*, 286 Ill. App. 3d 882, 887 (1997). With that principle in mind, we hold *res judicata* bars Kulik's claim because he could have challenged the affidavit of Discover Bank's servicing agent, James Ball, prior to entry of summary judgment, but he did not do so. "The doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction acts as an absolute bar to subsequent action between the same parties or their privies involving the same claim, demand, or cause of action." *Wilson v. Edward Hospital*, 2012 IL 112898, ¶ 9. The requirements for the doctrine of *res judicata* to apply are: "(1) there was a final judgment on the merits rendered by a court of competent jurisdiction, (2) there is an identity of cause of action, and (3) there is an identity of parties or their privies." *Nowak v. St. Rita High School*, 197 Ill. 2d 381, 389 (2001). Significantly in this case, "[r]es judicata bars not only what was actually decided in the first

action but also *whatever could have been decided.*" (Emphasis added). *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (2008); see also *Nowak*, 197 Ill. 2d at 389 ("When *res judicata* is established as a bar against the prosecution of a second action between the same parties upon the same claim or demand it is conclusive as to every matter which *was* offered to sustain or defeat the claim or demand, but as to any other matter which *might* have been offered for that purpose.") (Emphasis in original).

¶ 23 *Res judicata* applies here because the circuit court of Cook County, a court of competent jurisdiction, entered summary judgment against Kulik in the original action based on his credit card debt. Kulik and Discover Bank are the same parties in this matter and Kulik is contesting the same credit card debt. Accordingly, Kulik is barred from raising matters in this action that could have been brought at the time of the entry of summary judgment. *Id.* Kulik's claim is based on his theory that James Ball, Discover Bank's servicing agent who provided the affidavit that Discover Bank attached to its motion for summary judgment, did not have personal knowledge of the facts that he attested to because he "robo-signed" the affidavit. A comparison of the documents Kulik relies upon here to advance his theory in his petition to vacate were available prior to the circuit court's entry of summary judgment on June 22, 2010. Kulik's handwriting expert, Warren Spencer, compared James Ball's signature as found on Ball's February 12, 2009, application to be a notary public in the state of Ohio with Ball's signature on the affidavit Discover Bank attached to its motion for summary judgment, dated March 16, 2010. Spencer found Kulik's signature on the two documents were "dissimilar." On May 25, 2010, Discover Bank filed its motion for summary judgment. Accordingly, a comparison of the dates

of the relevant documents shows that Kulik could have attacked Ball's affidavit based on his theory of robo-signing prior to the entry of summary judgment. Kulik did not do so here and, therefore, his claim is barred by *res judicata*.

¶ 24 Similarly, Kulik's claim would also fail under section 2-1401 of the Code because of his lack of diligence in attacking Ball's affidavit. 735 ILCS 5/2-1401 (West 2012). "Relief under section 2-1401 is predicated upon proof, by a preponderance of the evidence, of a defense or claim that would have precluded entry of the judgment in the original action *and diligence in both discovering the defense or claim* and presenting the petition." (Emphasis added). *People v. Vincent*, 226 Ill. 2d 1, 7- 8 (2007). The dates of the relevant documents show Kulik could have presented his theory and challenged Ball's affidavit prior to the entry of summary judgment. We cannot say here that Kulik showed by a preponderance of the evidence that he was diligent in discovering or presenting his robo-signing theory to attack Ball's affidavit. Furthermore, Kulik has not, either before this court or before the circuit court, alleged any facts showing that he acted diligently in discovering this new theory attacking Discover Bank's affidavit. Rather, he simply states that he acted diligently without actually alleging how he did so. Therefore, in addition to being barred under the doctrine of *res judicata*; Kulik's claim of newly discovered evidence also fails under section 2-1401 of the Code because he has not shown due diligence in presenting his claim.

¶ 25 CONCLUSION

¶ 26 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 27 Affirmed.